No. 12,553

IN THE

United States Court of Appeals

For the Ninth Circuit

ARNOLD ENRIQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court
District of Arizona.

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No. 12553

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Appeal from the United States District Court
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JURISDICTIONAL MATTERS

On April 28, 1950 in the United States District Court for the District of Arizona the appellant, Arnold Enriquez, was found guilty of conspiring to violate certain laws relating to narcotics (T.R. 46). On May 1, 1950 he moved for a Judgment of Acquittal on the ground of insufficiency of evidence (the motion being equivalent to one for a directed verdict) and a motion for a new trial (T.R. 47-49). On May 15, 1950 the court denied the motions and ad-

judged the appellant guilty as charged in Count 78 of the Indictment (T.R. 52). On the same day a Notice of Appeal was filed (T.R. 55).

The District Court had jurisdiction under 18 U.S.C. Section 3231. This Court has jurisdiction under 28 U.S.C. Section 1291.

STATEMENT OF FACTS

A grand jury returned an indictment against appellant and five others (T.R. 2).[1] In addition to Count 78 stating a conspiracy in violation of 18 U.S.C. (1946 Ed.) Sec. 88 and 18 U.S.C. Sec. 371,[2] 77 counts charged objective offenses in violation of 21 U.S.C. Sec. 174[3] and 26 U.S.C. Sec.

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(1) Arturo C. Leyvas, Ray C. Leyvas, Connie Duarte, Arturo E. Jerez, and Joe Martinez.

(2) 18 U.S.C. (1946 Ed.), Sec. 88 reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both."

18 U.S.C. Sec. 371 reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

The government charged but one conspiracy; hence appellant could not have been found guilty of violating both the old and the new statute. But he was.

(3) 21 U.S.C. Sec. 174 reads: "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such

2554 (a)[4]. Of these substantive counts, nine relate specifically to the appellant[5] (T.R. 2).

Appellant's codefendants pleaded guilty (T.R. 38, 61). Appellant was tried; and at the close of the government's case, the Court entered a judgment of acquittal on all the substantive counts (see note (5)). It denied a motion for judgment of acquittal on the conspiracy count (T.R. 255).[6]

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person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

(4) 26 U.S.C. Sec. 2554(a) reads: "It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

(5) Counts 52, 53, 54, 64, 65, 66, 67, 68 and 69.

(6) The conspiracy count (T.R. 33), omitting the overt acts which the court either did not read to the jury or told the jury to disregard because the judge concluded that the evidence did not establish them (T.R. 297), reads:

County Seventy-Eight

(18 U.S.C.A. 88 (1946 Ed.) and 18 U.S.C.A. 371)

"1. That in the month of February, 1948, and continuing thereafter until on or about the 16th day of February, 1949, in the County of Maricopa, Arizona, and within the District of Arizona, and at other places to the Grand Jurors unknown, the said defendants, Arturo C. Leyvas, Arnold Enriquez, Ray C. Leyvas, Connie Duarte, Arturo E. Jerez and Joe Martinez, the identical persons named as defendants in one or more of the above and foregoing seventy-seven counts of this indictment, and in this count hereinafter referred to as the conspirators, did wilfully, knowingly and feloniously conspire, combine, confederate and agree between themselves, and each other, and other persons to the Grand Jurors unknown, to commit the diverse offenses charged against said defendants in the first seventy-seven counts of this indictment preceding this count, and made offenses by Title 18 U.S.C.A. 174 and Title 26 U.S.C.A. 2554(a), the allegations of which seventy-seven

On the close of the evidence, the case was submitted to a jury. It returned a verdict of guilty upon which judgment was entered (T.R. 46, 52). Hence this appeal.

Viewing the evidence in a light most favorable to the government, the facts are these:

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counts of this indictment are incorporated in this count by reference as fully as if they were herein repeated.

"2. That the object of said conspiracy was knowingly, unlawfully, wilfully and fraudulently, in said District of Arizona, to import and bring into the United States, and cause to be imported and brought into the United States, prepared smoking opium, morphine hydrochloride (an opium derivative), heroin hydrochloride (a morphine derivative) and yen shee (an opium derivative), and to wilfully and fraudulently receive, conceal and facilitate the transportation and concealment, after the unlawful importation thereof, of the above-named narcotic drugs; and further, to unlawfully, fraudulently and feloniously sell, distribute and give away to diverse persons, certain quantities of the said narcotic drugs, not in pursuance of written orders from the transferees to the said conspirators, on forms issued in blank for that purpose by the Secretary of the Treasury of the United States as required by virtue of Title 26 U.S.C.A. 2554(a); that in furtherance of said conspiracy and to effect the object thereof, the said conspirators did, among others, commit the following overt acts, to wit:

(a) That at the time and place as alleged in each of the first seventy-seven counts of this indictment, each of the said conspirators committed the offense charged against said conspirators in each of said counts, in the manner charged therein, the allegations concerning which in said counts are hereby incorporated by reference thereto in this count as fully and with like effect, for all purposes, as though the same were here reiterated and repeated.

(b) That on or about February 15, 1948, at Tempe, Arizona, the conspirator, Arturo Jerez, offered to sell one Viron A. Elkins prepared smoking opium.

(c) That on or about December 15, 1948, at Phoenix, Arizona, conspirator Ray Leyvas had a conversation with one Viron A. Elkins.

(d) That on or about December 15, 1948, at Phoenix, Arizona, conspirator Ray Leyvas told one Viron A. Elkins that he thought he could get the said Viron A. Elkins an ounce of heroin.

(e) That on or about the 16th day of December, 1948, at Tempe, Arizona, the conspirator Ray Leyvas informed the said Viron A. Elkins that he would bring the heroin to him about 5:30 p.m. that day.

(f) That on or about the 16th day of December, 1948, at Tempe, Arizona, conspirator Ray Leyvas, in company with conspirators

From February, 1948 to February, 1949 in Phoenix and Tempe, Arizona, government undercover agents and government informers made purchases of narcotics from the alleged coconspirators of the appellant. There were twenty-three distinct transactions (T.R. 82, 94, 107, 110, 116, 118, 121, 123, 126, 143, 148, 152, 154, 155, 162, 170, 183 and 213). The appellant was not present at any of the negotations and there was no direct evidence that he had anything to do with sales, concealment, transportation or any other act condemned by the applicable statutes (T.R. 136, 189, 190, 191, 215, 235 and 236). At least seven government agents (T.R. 97, 119, 126, 219, 281) and three informers (T.R. 78, 216, 226) worked actively in the field for over a year attempting to implicate appellant (e.g., T.R. 192, 194). Aside from a monetary incentive, they used the fact of friendship and the purported fact of illness (e.g. T.R. 274) in their unsuccessful attempt to induce appellant to sell or facilitate the sale of narcotics. The only positive, direct evidence in the record relating to appellant is that he was having nothing to do with drugs. Disregarding his testimony at the trial when he emphatically denied the charges made against him (T.R. 259 et seq.), the government conceded that during its investigation, appellant consistently told even those who he believed were his friends that he did not deal in the "stuff" (e.g. T.R. 194).

Connie Duarte and Arturo C. Leyvas, introduced the said Arturo C. Leyvas to the said Viron A. Elkins as his brother.

(g) That on or about the 16th day of December, 1948, at Tempe, Arizona, conspirator Arturo C. Leyvas delivered to the said Viron A. Elkins a capsule containing white powder.

* * * * * * *

(j) That on or about January 12, 1949, at Phoenix, Arizona, conspirator Arnold Enriquez told one Frank W. Colbert that 'I would like to take care of you but there isn't any stuff in town. Art is out of town now to bring in a load and he will be here on Friday but until he comes back there is no stuff here.' "

There was not an iota of evidence to support the nine substantive counts of the indictment which were directed against appellant. The evidence on the conspiracy count was all circumstantial; and the judge of the lower court, obviously in doubt (T.R. 255) and feeling that the evidence "might" be sufficient to sustain a verdict of guilty, let the jury have the case (T.R. 292).

Support for the government's case comes from the following enumerated elements.

First: *Guilt by association.* The appellant was friendly toward his guilty codefendants; he had known them for some length of time; and was seen in their company on various occasions (T.R. 256). (Appellant's occupation is that of an operator of a court consisting of twenty-one cottages which he owns (T.R. 257). He also owns property which is leased for a bar, property leased for a restaurant (T.R. 258) and property which had been leased for the use of a social club—the Pan-American Democratic Club (T.R. 140), referred to at times in the transcript as Pirata's Club).

Second: *Guilt because others wrongfully used property.* A Cadillac automobile owned by the appellant (T.R. 104) was on one occasion—July 22, 1948—used by the defendant Arturo E. Jerez to deliver opium to the government informer Elkins (T.R. 99); and on one occasion—January 15, 1949—it was used by the defendant Joe Martinez to deliver opium to a government informer, Cobos (T.R. 227). (However, the appellant loaned this car to numerous persons (T.R. 277), and defendant Joe Martinez used it most of the time when he was the manager of Pirata's Club (T.R. 276). There is no evidence whatsoever that

appellant had any knowledge that the automobile was used to effectuate any illegal transaction).[7]

Third: *Guilt because of knowledge that another is committing a crime.* A government agent testified that he met appellant at the Pan-American Club and told appellant that he had to get some "stuff" right away; that appellant said: "There isn't anything in town, and you will not be able to get anything until Art [Leyvas] gets back * * * I'd like to help you, but there isn't anything I can do until the stuff gets here * * * I know that Art is going to be back tomorrow night * * * I will see that Art meets you right here" (T.R. 173, 174). The next day, according to the witness, Art saw him and said: "Arnold told me to contact you" (T.R. 176). And in behalf of the prosecution, a drug addict—Colbert—who was paid by the government for his testimony (T.R. 218) related that he asked appellant for some opium and appellant replied "that there was nothing in town, that Art would be back Friday * * * and I would have to wait until he got back" (T.R. 217).

(These two witnesses had ingratiated themselves with appellant (see, generally, T.R. 216 and Johnson's testimony, T.R. 147 et seq.). Assuming that appellant knew that "Art" was obtaining opium, if appellant were "conspiring" he was doing so with government agents—not his codefendants as will be demonstrated below.)

Fourth: *Guilt by conjecture.* A government agent, Earl A. Smith, testified that on two occasions he saw another

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(7) A casual reading of the Reporter's Transcript gives the false impression that appellant's car was used constantly to carry out the object of the alleged conspiracy. Witnesses referred to the "Cadillac" by name 27 times and in many instances referred to "Enriquez' car." The fact is that covering a period of a year, it was connected with narcotic traffic only twice.

government agent, Cobos, dial the telephone number listed in appellant's name. Following the two calls defendant Joe Martinez met Cobos. Cobos turned over to agent Smith some opium (T.R. 226-229). Smith further testified that on a third occasion, agent Cobos dialed appellant's number, talked in Spanish, hung up, dialed the unlisted number of defendant Connie Duarte, mentioned "Pirata" several times; and defendant Joe Martinez came to the Cobos' house (T.R. 230, 231). The agent who allegedly made these calls did not testify at the trial.

There is no evidence that Cobos talked on the telephone with appellant; there is no evidence that any telephone conversations related to narcotics or related to any of the objects of the alleged conspiracy; there is no evidence that there was any relationship between the calls and the delivery of opium. In fact there is no evidence that any of the defendants delivered any narcotics to Cobos.

Fifth: *Guilt by a prior conviction.* Over strenuous objection (T.R. 239), prior to the time the appellant took the stand, the Court admitted in evidence a certified copy of a judgment showing that on March 5, 1945 appellant had been adjudged guilty of violating 21 U.S.C. Sec. 174 and 26 U.S.C. Sec. 2553 (T.R. 240).[8] [9]

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(8) Government's Exhibit No. 29

In the United States District Court for the District of Arizona
No. C-10038-Tucson

United States of America,
Plaintiff,

vs.

Arnold S. Enriquez,
Defendant.

Due proceedings having been had on the Indictment filed herein presented against the defendant above-named charging a violation

THE ISSUES INVOLVED

There are three issues which are set forth in the Specification of Errors. (1) Is the evidence sufficient to sustain

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of Title 21, United States Code, section 174 and Title 26, United States Code, section 2553 as charged in counts 2 and 3 thereof.

It Is Ordered, Adjudged and Decreed that said defendant is guilty of said crime and in punishment thereof that said defendant be committed to the custody of the Attorney General of the United States or his duly authorized representative for imprisonment in such place of confinement as the said Attorney General shall designate for a term of two (2) years and six (6) months on each of said counts 2 and 3, said terms of imprisonment to run concurrently with each other and that said defendant be fined in the sum of $1,000.00 on count 2 and in the sum of $500.00 on count 3, and that in default of payment of said fines he stand committed until the same are paid or he is otherwise discharged by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and committment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Dated at Tucson, Arizona, March 5, 1945.

/s/ Albert M. Sames,
Judge.

A True Copy. Certified this 5th day of March, 1945.

Edward W. Scruggs,
Clerk.
Jean E. Michael,
Deputy.

(Endorsed): Filed March 5, 1945.

(9) On this point, the court instructed the jury as follows:

"Now, evidence of a former conviction of the defendant for a similar offense was introduced in evidence. This was for a very limited purpose. However, I will read you an instruction in connection with that.

"The fact that the accused may have committed an offense at some time is not evidence that at a later time the accused committed the offense charged in the indictment, even though both offenses be of a like nature. Evidence as to an alleged earlier offense of a like nature may not therefore be considered in determining whether the accused did the acts charged in the indictment. Nor may such evidence be considered for any other purpose, unless the jury first finds that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the acts charged in the indictment.

"If the jury should find from the other evidence in the case that the accused did the acts charged in the indictment, then the jury may consider evidence as to an alleged earlier offense in determin-

the verdict? This was raised by the motions for judgment of acquittal and new trial (T.R. 47, 48, 250 et seq.). (2) Was it error for the court to admit into evidence the record of the prior conviction? This was raised by proper objection. (3) Was it error for the court to permit one government agent to testify that he saw another government agent (who was not present at the trial) dial certain telephone numbers and say certain things on the telephone?

SPECIFICATIONS OF ERROR

I.

The lower court erred in refusing to grant appellant's motion for judgment of acquittal on Count 78; erred in denying appellant's motion for a new trial; and erred in entering judgment on the verdict; for the evidence was insufficient to sustain the conviction.

II.

The lower court erred in admitting into evidence government's exhibit No. 29 which is a certified copy of a judgment of the prior conviction of appellant, dated March 5, 1945, based on an indictment charging him with violation of laws relating to narcotics (T.R. 240). Appellant objected to its introduction on the grounds that it was "improper and immaterial; incompetent. It goes to the offenses which are not in issue at this time. It goes to impeach the defendant who has not at this time taken the

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ing the state of mind or intent with which the accused did the acts charged in the indictment. And, where all the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the indictment, the accused acted wilfully, and not because of mistake or inadvertence or other innocent reason."

witness stand'' and it was too remote to be admissible on the question of intent (T.R. 239).

III.

The Court erred in denying appellant's motion to strike the testimony of the government witness to the effect that he heard a government informer, after dialing appellant's telephone number, ''talk to someone which he called 'Pirata' [appellant] in Spanish'' (T.R. 228).

Appellant's counsel objected by saying ''I move that be stricken as hearsay'' (T.R. 228).

The Court also erred in permitting the same government witness to testify that on another occasion he saw the government informer dial appellant's number, speak in Spanish, hang up, dial the number of one of the other defendants, and heard the informer say, ''Let me speak to Pirata''. ''He [government's informer] then carried on a conversation in Spanish which the name 'Pirata' was mentioned several times, and then hang up.'' (T.R. 230). Appellant's counsel raised the point by ''I object to what he said as being hearsay'' (T.R. 230).

The government informer did not testify at the trial.

ARGUMENT

The Facts Are Not Sufficient to Support the Verdict

I.

The lower court erred in refusing to grant appellant's motion for judgment of acquittal on Count 78; erred in denying appellant's motion for a new trial; and erred in entering judgment on the verdict; for the evidence was insufficient to sustain the conviction.

Are the facts sufficient to sustain the verdict? It is respectfully submitted that they are not.

There is no evidence, direct or circumstantial, showing that the appellant entered into an agreement, express or

implied, with his alleged coconspirators. There is no evidence of his joining in a common design to violate laws relating to narcotics. There is no evidence that appellant had any interest in the other defendants' unlawful enterprise.

Consider the elements making up the government's case.

A. MERE ASSOCIATION WITH ALLEGED COCONSPIRATORS DOES NOT ESTABLISH GUILT.

The appellant knew the codefendants (T.R. 256, 257). He sometimes would be seen with one or another of them at the Pan-American Club, playing poker (T.R. 142), going to prize fights (T.R. 281), enjoying a glass of beer (T.R. 173). His contacts with the codefendants were always in the open. There were no secretive meetings, no undercover gatherings. As the Court said in *United States v. Di Re* (1948), 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210,[10]

> "Presumptions of guilt are not lightly to be indulged from mere meetings."

Casual and unexplained meetings do not establish knowledge of a conspiracy. *United States v. Falcone* (1940), 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128.

And in *Dennert v. United States* (6th Cir. 1945), 147 F. 2d, 286, it is said:

> "Nor was there any proof that he [appellant] conspired. It may not be inferred from casual and unexplained meetings between Dennert and other persons charged, that he participated or even knew of the conspiracy * * * 'Circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt * * * A conviction resting on them alone cannot stand.' "

(10) There were two dissents.

In *Sugarman v. United States* (9th Cir. 1929), 35 F2d 663, appellant Williams was found guilty with others of conspiring to violate certain laws relating to intoxicating liquors. At the time of his arrest he gave a fictitious name; pants which were found in a boat used to import liquor matched a coat he was wearing and he was seen in the company of the alleged co-conspirators. In reversing, this court said:

> The appellant "was referred to on different occasions as one of the parties employed by the conspirators in the transportation of liquor from boats offshore to land, but this testimony was not sufficient to connect him with the conspiracy, and was not competent for that purpose * * * It will thus be seen that the only competent testimony tending to connect the appellant Williams with the commission of the offense was the company he was found in, the giving of an assumed name at the time of his arrest, and the unexplained possession of a coat comparing in texture with a pair of pants found in an abandoned boat. Whatever suspicion these facts may give rise to, they are in our judgment legally insufficient to support a verdict of guilty."

See, also, *United States v. Bonazani* (2nd Cir. 1938), 94 F2d 570.

As it is pointed out in the Statement of Facts, appellant never had any participation in the nefarious activities of the other defendants. His association with them was as normal as the association of any person with his club members and friends. A verdict of guilty cannot rest on the presumption that "birds of a feather flock together."

B. THE USE BY THE ALLEGED COCONSPIRATORS OF APPELLANT'S AUTOMOBILE DOES NOT ESTABLISH GUILT.

The defendant Joe Martinez, who was president of the Pan-American Democratic Club (T.R. 140), once used appellant's car to deliver opium to a government informer (T.R. 276) and defendant Jerez once used it for the same purpose (T.R. 99).

It is not necessary to cite cases to the effect that if one's property is used without his knowledge to further the unlawful designs of conspirators, the owner does not thereby become a member of the conspiracy. Nor is it necessary to cite cases to the effect that if one unwittingly and unknowingly is used to further such unlawful designs, he does not thereby become a member of a conspiracy. See *Canning v. United States* (9th Cir. 1941), 119 F2d 130; *Ching Wan v. United States* (9th Cir. 1929), 35 F2d 665. There was no evidence from which it can even be inferred that appellant knew that his car was used to transport narcotics.[11]

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(11) Even contribution of property with the knowledge that it will be used illegally does not necessarily make one a party to a conspiracy. In *United States v. Falcone* (1940), 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128, sugar was sold to illegal distillers, the sellers knowing it would be used in violation of law. The vendor was held not to be a party to the conspiracy of the buyers. This case probably expressly—at least necessarily by implication—overrules that portion of *Marino v. United States* (9th Cir. 1937), 91 F2d 691, 113 A.L.R. 975, relating to appellant Gullo. Gullo permitted his farm to be used in connection with a conspiracy to unlawfully import intoxicating liquors. This court held that that made him a co-conspirator. For a general note on this subject see 62 *Harvard Law Rev.* 276.

C. MERE KNOWLEDGE BY APPELLANT THAT ALLEGED COCONSPIRATORS VIOLATED THE LAW DID NOT MAKE APPELLANT A CONSPIRATOR WITH THEM.

1. There Was No Evidence That Appellant Was a Confederate of the Co-defendants.

As shown in the Statement of Facts, *supra,* government agents sought to make purchases of narcotics from appellant. On the two occasions on which he was approached he, in effect, replied: "There isn't anything in town until Art gets back. I will see that Art meets you" (T.R. 173, 218). This evidence is not sufficient as a matter of law or fact to convict appellant of conspiracy. Similar facts have been considered by the courts and they have so concluded. Thus, in *Morei v. United States* (6th Cir. 1942), 127 F2d 827, Dr. Platt was indicted with others for violation of 26 U.S.C. Sec. 2553 and for conspiracy. The lower court dismissed the conspiracy count. On the other count, Platt was found guilty. The Court of Appeals reversed, saying that on the following facts a motion for a directed verdict should have been granted:

Dr. Platt, who was on probation for violation of narcotic laws, was approached by a government informer who requested that he be given heroin in violation of the applicable law. Platt replied that he had none, but he gave the informer the name of Morei, the latter's address, and told the informer "to see Morei and tell him that the doctor had sent him and that 'he will take care of you.'" The informer contacted Morei and showed him the doctor's prescription blank with Morei's name on it. Morei unlawfully gave narcotics to the informer.

The Court said:

> "There is no evidence that Dr. Platt planned with the other defendants or conspired directly or indirect-

ly with them, or had any understanding with Morei to buy or sell narcotics. There was no community of scheme between him and the other defendants. They shared in no common intent or plan, nor was there any prearrangement or concert of action. Dr. Platt was paid nothing and it is not claimed that he asked for any remuneration or expected to receive anything from the claimed transaction."

In *Hubby v. United States* (5th Cir. 1945), 150 F2d 165 the appellant Hubby and one Akin were indicted for violation of laws relating to narcotics. Akin, who worked for appellant as a clerk in a hotel, pleaded guilty. Appellant was tried, found guilty, and appealed. A government agent testified that he and an informer approached Hubby at the hotel and asked how much they would be charged for a "big paper." Hubby replied, "You will have to see Mr. Akin, he is across the street over there drinking coffee." They saw Akin, who took them to the hotel. Akin went inside and came out with heroin, which he sold to the informer. It was held that these facts were insufficient to sustain a verdict of Hubby's guilt of being severally and jointly liable with Akin for concealing narcotics.

The Second Circuit in *United States v. Di Re* (1947), 159 F2d 818,[12] affirmed in 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210, expresses the principle with these words:

> "We have several times had occasion to consider what relation to a conspiracy makes a man a confederate * * * and we have uniformly held that the prosecution must prove the accused to have associated himself with the principals in the sense that he has a stake in the success of the venture * * * Even if Di Re had known that Buttitta and Reed were dealing

(12) Clark, J. dissented.

in counterfeit ration coupons, there was not the slightest reason to suppose that he was himself either a seller or a buyer; or that he had any interest whatever in their enterprise * * * Nobody would assert that all the spectators of a crime may be arrested as participants, and even though riding in a car [where the illegal sale of coupons took place] with two such offenders be evidence of acquaintance, or possibly friendship, with them, it would be altogether unwarranted to carry the inference further than complaisance (12)."

And in this circuit, the court said in *Weniger v. United States* (1931), 47 F2d 692:

"The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto. Neither will the commission of an overt act, though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

The authorities in accord with the doctrine of the *Weniger Case* are many. So, in *Dickerson v. United States* (8th Cir. 1927), 18 F2d 887, the court said:

"To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement."

See, also, *Ventimiglio v. United States* (6 Cir. 1932), 61 F2d 619; *Thomas v. United States* (10th Cir. 1932), 57 F2d 1039; *Cartello v. United States* (8th Cir. 1937), 93 F2d 412; *United States v. Koch* (2nd Cir. 1940), 113 F2d 982; *Turcott v. United States* (7th Cir. 1927), 21 F2d 829; *Simon v. United States* (6th Cir. 1935), 78 F2d 454.

2. The Evidence Shows That if Appellant Participated in Unlawful Activities He Did So as an Agent for the Government and Hence Is Not Guilty of Conspiring with the Codefendants.

The lower court determined that there was "certainly" not enough evidence to sustain the charges that appellant imported narcotics into the United States, or assisted in so doing, or that he received or concealed or facilitated the transportation and concealment thereof; and the lower court determined that appellant did not sell, distribute or give narcotics away (T.R. 255). However, the court permitted the jury to decide whether or not the appellant conspired with the defendants to do one or more of these unlawful acts. The evidence does not show that he did. Looking at it in the harshest light from the standpoint of the appellant and in the most favorable light from the standpoint of the government, the most that can be said is that the appellant was a "confederate" of the government in its attempt to induce others to commit a crime. Assuming (as it reluctantly must be assumed on this appeal) that the government informer Colbert, a felon and a drug addict (T.R. 218), asked the appellant where he could get narcotics, urging that he needed them badly (T.R. 217) because he was sick (T.R. 274) and assuming that the government's "professional witness" (see the testimony, T.R. 138 et seq.) asked where he could get narcotics (T.R. 173), saying that he needed it badly (Id., 173);

and assuming that appellant said, "You will have to wait until Art gets back"—assuming these as postulations, the only deduction is that appellant knew someone who could help the government witnesses and that he aided those government witnesses in their plan. Assuming all this to be true it is apparent that the appellant was not conspiring with the other defendants. The indictment did not charge appellant with conspiring with agents of the government to buy narcotics; and the facts do not show that he conspired with purported sellers. The case of *Lambert v. United States* (5th Cir. 1939), 101 F2d 960 discusses the point. There, the appellant Lambert aided one Christian in illegally obtaining morphine. Lambert was charged with the Hargroves, senior and junior, of conspiring to sell narcotics to Christian. Said the court:

> "Appellant could have been guilty of conspiring to sell, and also of aiding and abetting in the sale. The difficulty here is with the proof. All that it shows is that appellant acted with Christian in his efforts to purchase. It does not show that he was in any sense acting in concert with the Hargroves, the sellers. His concert was with Christian, the purchaser, not with the Hargroves, the sellers. Under the evidence he could no more have been held guilty of a conspiracy to sell, than could Christian * * *
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> "Proof * * * that one was acting with the buyer to effect a purchase, is not proof that he was acting with the sellers to effect a sale. Every fact and circumstance in the record points to appellant as an aider and abettor of Christian; not a single one points to him as an aider and abettor of the Hargroves."
> (Note: one judge dissented).

The fact situation is no different in principle than others commonly experienced. During Prohibition Days a reputably respectable person would tell another the address of the nearest "speakeasy"; during the war, a housewife would tell another where "blackmarket" nylon stockings could be bought; today, a horse-racing enthusiast may learn from his neighbor the location of the nearest "bookie joint." All are condemnable. But the informant in the illustrations given is not necessarily a conspirer with the bootlegger or the black-marketer or the bookie (see, generally, 62 *Harvard Law Review* 276; 77 *Univ. Pa. Law Review* 535).

Admittedly, illicit dealings in drugs is more infamous than the transactions mentioned in the illustrations given. Prejudice results in the mere charge of selling drugs; and consequently the rights of the appellant should be more closely guarded.

D. TELEPHONE CALLS TO THE HOME OF APPELLANT AND SUBSEQUENT MEETINGS BETWEEN A GOVERNMENT INFORMER AND ONE OF APPELLANT'S CODEFENDANTS HAD NO PROBATIVE VALUE IN ESTABLISHING APPELLANT'S SUPPOSED GUILT.

The government created the impression that in response to three telephone calls narcotics were delivered by defendant Martinez to the informer Cobos. The facts, however, show the contrary. Exhibit 19—a jar of opium—was sought to be related to a telephone call made on January 15, 1949 (T.R. 226, 228). Cobos handed Exhibit 19 to the government agent Smith at 1:45 p.m. (The time element is probably accurate because the standard procedure is for the government agent to write the time of receiving an exhibit on the exhibit itself) (T.R. 110). But the telephone call was made at *about* 2:00 p.m. (T.R. 226). Assuming (in the interest of the prosecution) that it was made prior

to 1:45 p.m., nevertheless, Cobos did not meet the defendant Martinez, who purportedly delivered Exhibit 19 to Cobos, until *after* 1:45 p.m. (T.R. 226, 227). The only consistent conclusion is that this exhibit was turned over to agent Smith prior to the time Cobos met Martinez! There was nothing to connect the exhibit with the telephone call or with any of the defendants.

Exhibit 22—a jar of opium—was sought to be related to the telephone call made on February 6, 1949 (T.R. 228, 229). Cobos handed government agent Smith Exhibit 22 at 11:05 a.m. (T.R. 229). The facts show that some time *after* 11:00 a.m. Cobos met the defendant Martinez, who purportedly delivered Exhibit 22; that he was with the defendant for "ten or fifteen minutes"; that Cobos then walked down the street and met government agent Smith. It is obvious that Cobos did not leave the defendant Martinez until *after* 11:05 a.m. (T.R. 229). The only consistent conclusion is that the exhibit was turned over by Cobos to agent Smith *prior* to the time Cobos met the defendant Martinez. There was nothing to connect the exhibit with the telephone call or with any of the defendants.

Exhibit 23—a jar of opium—was sought to be related to the telephone call of February 8, 1949 (T.R. 230, 231). Witness Smith testified to the incident of the call and a meeting between defendant Martinez and Cobos. The witness was handed Exhibit 23 and asked to identify it. He answered: "This is a jar of opium that was turned over to me * * * by Cobos (T.R. 231). He did not connect it up with the telephone call or with any of the defendants.

The only discrepancy in the government's evidence relating to the identity of 25 narcotic exhibits (T.R. 42) relates to these three exhibits. They are the only exhibits which have a speculative value in determining the guilt

or innocence of the appellant, the other exhibits having no value at all. Singularly, too, they are the only exhibits supposedly procured by the informer Cobos, who worked for the government on other investigations (T.R. 238) and who, without explanation, was not called by the government to testify.

As it is said in *Morei v. United States* (6th Cir. 1942), 127 F2d 827 in regard to the government informer Sargent, who did not testify at the trial:

> "It may be observed that the failure of the Government to call Sargent, a most important witness in view of the disputed testimony, was unexplained, and, under the circumstances, every inference and conclusion must weigh against the contention of the Government on this phase of the case."

In accord is *United States v. Di Re* (1948) 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210.

II.

The Lower Court Erred in Permitting the Government to Introduce Into Evidence a Record of a Prior Conviction

The lower court erred in admitting into evidence government's exhibit No. 29, which is a certified copy of a judgment of the prior conviction of appellant, dated March 5, 1945, based on an indictment charging him with violation of laws relating to narcotics (T.R. 240). Appellant objected to its introduction on the grounds that it was "improper and immaterial; incompetent. It goes to the offenses which are not in issue at this time. It goes to impeach the defendant who has not at this time taken the witness stand" and it was too remote to be admissible on the question of intent (T.R. 239).

In the case at bar the appellant was found guilty of *conspiring* to violate 21 U.S.C. Sec. 174 and 26 U.S.C. 2554 (a).

Was the judgment of conviction of violating 21 U.S.C. 174 and 26 U.S.C. 2553, entered more than four years prior to the finding of the indictment now being considered, properly admitted? If it was not, the case should be reversed for obviously it was of extreme prejudice to the appellant and no kind of instruction to the jury could render the error harmless.

The question of the admissibility of prior offenses to prove knowledge or absence of mistake is difficult of presentation. Wigmore (II *On Evidence* (3rd Ed.) Sec. 302, page 200) finds "bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction in cases of the same offense." In "The Rule of Exclusion of Similar Fact Evidence: America" (1938), 51 *Harvard Law Review* 988, the author Julius Stone writes that there are a "thousand or so" decisions on the subject. He, too, finds irreconcilable conflict.

The cases, however, fall generally into a pattern. The law most uniformly recognized is thus expressed in *Smith v. United States* (9th Cir. 1949), 173 F2d 181:

> "The normal rule, excepting possibly sex offenses, is that evidence of such acts [specific acts of criminal misconduct] is not admissible for the sole purpose of tending to prove the defendant committed the crime charged, i.e., to show more likelihood of guilt. The inquiry is not rejected because such evidence is irrelevant, but to the contrary, it is said to weigh too much with the jury to over-persuade them so as to prejudge one with a bad general record and so deny him fair opportunity to defend against a particular charge. It affords the jury an extraneous ethical justification for a finding of guilt."
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> * * * * * * *
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> "The common *exceptions* to the normal rule above stated are: (1) motive, (2) intent, (3) absence of mis-

take or accident, (4) underlying scheme or design embracing the commission of two or more crimes so related to each other that proof of one logically tends to establish the commission of the crime charged, (5) identity * * *".

The court points out, too, that where the accused introduces evidence of good reputation, commission of crimes may be shown by the prosecution.

Application of the rule is seen in *Crowley v. United States* (9th Cir. 1925), 8 F2d 118. There, the plaintiff in error was tried for conspiracy to violate the National Prohibition Act. The court admitted testimony that seven months prior to the alleged formation of the conspiracy the plaintiff in error had been caught with liquor in his possession. This court held that the evidence was inadmissible and that the error required reversal, saying:

> "It is not doubted at all that in a conspiracy case, where the evidence tends to prove that the defendant and one or more persons have entered into a common scheme to commit a crime such as unlawfully to transport liquor, evidence of other like offenses, committed by defendant in carrying on the common enterprise, is relevant as showing the knowledge or intent of the defendant. But in order to make such evidence admissible, there must be such a showing of connection between the different transactions as raises a fair inference of common motive in each. * * * Here there was no ground for any such inference."

In *Terry v. United States* (9th Cir. 1925), 7 F2d 28, the defendants were charged with conspiring to violate liquor laws at Allen's Wharf. It was held to be reversible error to admit evidence of violation of liquor laws at Bodega Bay some six weeks previously.

The exceptions prove the rule. Thus in *Gianotos v. United States* (9th Cir. 1939), 104 F2d 929 two offenses of illegal importation of narcotics were so inseparably connected that proof of one involved proof of the other. It was held not to be error to admit in evidence the facts of the importation for which the defendant was not tried. In accord are *Todorow v. United States* (9th Cir. 1949), 173 F2d 439; *Tedesco v. United States* (9th Cir. 1941), 118 F2d 737; and *McCoy v. United States* (9th Cir. 1948), 169 F2d 776. In *Henderson v. United States* (9th Cir. 1944), 143 F2d 681, a scheme was established and evidence of illegal acts in furtherance thereof were held to be admissible. In the case at bar, however, the violation of narcotic laws in 1945 was not a part of a "scheme" of the alleged conspiracy of 1948. It was not inseparably connected (or connected at all) with alleged conspiracy. It had no tendency to show a motive for appellant's alleged membership in the conspiracy. There was no relevancy to establish intent or knowledge or to show that appellant, if he was a member of the conspiracy, was not innocent of wrong doing. If the accused did the acts charged in Count 78, he was guilty of conspiracy regardless of whether or not he had previously violated the law. Consequently, the court erred in permitting the prosecution to introduce the record of conviction. *Lambert v. United States* (5th Cir. 1939), 101 F2d 960, *supra.*

The case of *Orloff v. United States* (6th Cir. 1946), 153 F2d 292 is probably contrary to the general rule. It is submitted that there the court misconceived the law relating to exclusions. The Court relied on *Kettenbach v. United States* (9th Cir. 1913), 202 F. 377. But that decision falls within a recognized exception. It was held

there that a series of erroneous bookkeeping entries in favor of defendants made during a period of seven years prior to the ones on which an indictment for violation of the National Banking Act was based were admissible. Such prior entries showed a scheme to defraud and detracted from the defense of accident or mistake. As pointed out in *Weiss v. United States* (5th Cir. 1941), 120 F2d 472, 122 F2d 675, one wrong bookkeeping error might be attributed to mistake; two errors might be; three might be. But as the number of errors increases so does the probability that errors were intentionally made. The logic of the case is good; but it is not applicable to the one now under consideration. The only relevancy of the prior conviction in the present case is to show the appellant's *propensity* to commit crime. And that is the very thing which the rule of exclusion of prior offenses is directed against. Thus, in *Michelson v. United States* (1948), 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168, it is said:

> "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

If the evidence of prior wrongdoing was properly admitted in this case then it follows that the "Rule of Exclusion" has been completely abolished.

III.

The Lower Court Erred in Admitting Hearsay Evidence

The Court erred in denying appellant's motion to strike the testimony of the government witness to the effect that he heard a government informer, after dialing appellant's telephone number, "talk to someone which he called 'Pirata' [appellant] in Spanish" (T.R. 228).

Appellant's counsel objected by saying "I move that be stricken as hearsay" (T.R. 228).

The Court also erred in permitting the same government witness ot testify that on another occasion he saw the government informer dial appellant's number, speak in Spanish, hang up, dial the number of one of the other defendants, and heard the informer say, "Let me speak to Pirata." "He [government's informer] then carried on a conversation in Spanish which the name 'Pirata' was mentioned several times, and then hang up" (T.R. 230). Appellant's counsel raised the point by "I object to what he said as being hearsay" (T.R. 230).

The government informer did not testify at the trial.

Hearsay evidence is defined as follows:

> "Evidence is called hearsay when its probative force depends, in whole or in part, on the competency and credibility of some person other than the witness by whom it is sought to produce it." *31 C.J.S. 919*

This is further brought out in *31 C.J.S. Sec. 188,* p. 911. The admissibility of testimony of a bystander as to one side of a telephone conversation is covered by the rule relating to the admissibility of oral conversation, so that one who overheard a telephone conversation should be permitted to testify thereto, provided that he is able to identify positively the speaker.

The theory under which such telephone conversations may be admitted is thoroughly discussed in *Johnston v. Fitzhugh* (1919), 91 Ore. 247, 178 P. 230.

> "If it is necessary to bind a particular person over the telephone, the identity of the person must be established to support the conversation but this may be done by means of circumstantial evidence. If it is established prima facie either directly or by circumstantial evidence that the conversation took place between individuals who could be bound by the same if carried on face to face, it is competent for a bystander to narrate that part of the conversation which he hears provided always that the statements which he heard are competent evidence."

The test and the proof necessary to identify the parties is further stated in the *Johnston Case* above:

> "Whether the conversation and participants are identified must, in the nature of things, depend upon circumstances of each case, where there is no direct statement that the voice of the individual at the other end of the line was recognized. But the principle is that the identification of the parties and the conversation may be proved, not only by direct, but also by circumstantial evidence. There must be at least a prima facie showing of a situation equivalent of what would be required if the participants in the conversation were face to face. In other words, the conversation must be such as would be admissible if those talking were in the immediate presence and hearing of each other, and it must be established prima facie, either directly or by circumstantial evidence, that the participants in the telephone conversation are persons whose utterances are competent evidence."

It is the appellant's contention that there was no direct or circumstantial evidence showing that the witness Cobos was speaking to the appellant. The evidence showed that the witness Smith testified that he saw Cobos dial a number, which later was proven to be the telephone number of the appellant, and talked to someone in Spanish, using the name "Pirata" several times. Pirata was proven to be the nickname of the appellant and subsequent to these telephone conversations Cobos had narcotics in his possession.

There is no evidence direct or circumstantial that Cobos, the absent witness, was talking to this appellant or to any codefendant or to any person whatsoever. Yet the fact that the court permitted Smith to testify that he heard Cobos mention this appellant's name over the telephone was very prejudicial to the appellant in view of the fact that a jar of opium apparently came into the possession of the absent witness shortly after the telephone conversation.

The test given was whether or not the conversation would have been admissible had the parties been face to face. Supposing instead of a telephone conversation, Smith had seen Cobos talking to a person, the question would be whether or not Smith could testify as to what the absent witness stated to another person. This would clearly fall into the hearsay rule and would be inadmissible. A situation arose in *Poole v. United States* (9th Cir. 1938), 97 F2d 423 where a police officer attempted to relate a conversation made by an absent witness to the defendant himself, who failed to reply to the statement made by the absent witness. The court here held that the statement made by the absent witness was hearsay and inadmissible.

It is therefore the appellant's contention that first there was no proof to show who the absent witness was talking to and that further, the use of the appellant's name in the conversation was inadmissible and that the entire testimony should not have been admitted over the objection of the appellant and that the admission of this evidence was prejudicial to the appellant.

CONCLUSION

The prosecution's case is based upon conjecture and inference on inference. There should be no straining to uphold the conviction. See Justice Jackson's opinion in *Krulewitch v. United States* (1949), 336 U.S. 440, 69 S. Ct. 716, 92 L. Ed. 790.

It is respectfully submitted that the judgment of the lower court should be reversed.

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